IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 69

Ernest A. Bell, Jr.,

Petitioner,

vs.

The State of Texas,

Respondent

REPLY BRIEF FOR THE PETITIONER

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ROBERT A. BELL, JR.,

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vs.

THE STATE OF TEXAS,

Respondent.

REPLY BRIEF FOR THE PETITIONER

I.

There Was No Necessity for Injecting Allegations of Petitioner's Prior Criminality Into the Trial on the Merits of the Primary Count.

In an effort to distinguish *Lane* v. *Warden, Maryland Penitentiary,* 320 F.2d 179 (4th Cir., 1963) the state makes the following contention:

> The Lane opinion at page 186 puts special emphasis on the proposition that the prejudice resulting from the reading of the two prior convictions to the jury could have been avoided by the State's following alternative Maryland procedures. No alternative methods of proving prior convictions are available under Texas practice. (State's Brief, p. 4)

This statement was previously made in the state's brief in response to the application for writ of certiorari. As noted in our reply brief filed at that time, the quoted statement is incorrect. The Maryland practice at the time of the *Lane* trial is described by the court in that case as follows:

> The problem of creating prejudice in the minds of the triers of fact by reading in open court the indictment containing allegations of prior criminal convictions of the accused is the same in the present case as it was in the Ferrone case. Even Maryland has now joined this group by the enactment of Maryland Rule of Procedure 713, effective January 1, 1962, *subsequent* to Lane's trial and convictions. 320 F.2d at 184. (Emphasis added.)

The relevant point in this case, as in *Lane,* is that adequate procedures *can* be readily provided, e.g., by withholding the reading of the enhancement count and withholding the proof of prior convictions until the jury has returned a verdict on the substantive phase of the case. These protective procedures are neither radical nor novel. See Act of 6 & 7 William IV, c. III, 1836. They do not lengthen the trial, but to the contrary, they lighten the work load of the court in that they obviate the necessity of inquiry into the prior offense if there is an acquittal on the principal offense.

The plea of necessity is continued in another vein at page 9 of the state's brief where it is urged that the necessity of punishing habitual criminals requires the procedure here in issue. The first fallacy in this argument is that it assumes the guilt of the defendant. The accused is not an

habitual criminal until he is convicted of the subsequent offense. He is entitled to a fair hearing on the issue of whether or not he is guilty of the principal offense. Moreover, the argument confuses the state's recidivist statutes, the validity of which are not an issue, with the procedures used to administer those statutes. The best rebuttal to this argument of necessity is Articles 36.01 and 37.07 of the new Texas Code of Criminal Procedure (State's Brief, p. 15). By the simple procedure provided in these statutes the rights of the accused are adequately protected without detriment to the state's recidivist statutes.

II.

Setting Out Multiple Offenses in a Single Indictment Is Not the Equivalent of Alleging Prior Convictions.

In an attempt to justify the procedure here in issue the state attempts to equate its procedure to the federal practice of permitting the consolidation of two or more indictments into a single trial. This argument erroneously equates the allegations of an indictment with the judgment of a court. The defendant is able to offer testimony on multiple indictment, but he is not allowed to go behind the prior conviction to relitigate the merits of the prior offense or to show extenuating circumstances. He can only stand mute on this issue while the state proves him to be a "convicted felon." We submit that juries give greater credence to the findings of courts than to the allegations of prosecutors and that they are more likely to regard prior convictions as evidence of present guilt than they are allegations which can be met with rebuttal evidence.

If the state wishes to look to the federal practice as a guide, it could follow *Marshall* v. *United States,* 360 U.S.

310 (1959) which held information as to prior convictions to be so prejudicial as to demand reversal.

III.

The Rule Excluding Evidence of Prior Convictions Is Fundamental and Essential to Due Process.

The state admits that admitting evidence of a prior conviction has a "tendency" to prejudice the rights of the accused. However, they submit that this is a "rule of evidence" rather than a constitutional right (State's Brief, p. 9).

This may define the problem, but it does not answer it. Constitutional rights and rules of evidence are not mutually exclusive. *Griffin* v. *California*, 380 U.S. 609 (1965).

The Court of Criminal Appeals of Texas in *Seay* v. *State*, 395 S.W.2d 40 (1965) stated that evidence of prior convictions was "highly inflammatory and prejudicial to appellant and stripped him of a fair and impartial trial that he was entitled to receive". 395 S.W.2d at p. 45. In *Huron* v. *State*, 30 S.W.2d 326 (Tex. Crim. App., 1930) the court states that admitting testimony of an unrelated federal offense in a state prosecution "would necessarily be of much prejudice to the appellant in the eyes of the jury".

The Court of Criminal Appeals of Texas when first confronted with the decision in *Lane* stated that it was "certainly persuasive", *Oler* v. *State*, 378 S.W.2d 857 (1964), but declined to follow it because it lacked rule making powers.

In a comment upon the new Texas Code of Criminal Procedure the State Bar of Texas recognized the validity of

Lane with the following comment on Article 37.07 which corrects the procedure here in issue:

> Another great stride toward a better administration of justice has been effected by this article (37.07). It insures an accused a trial on the issue of guilt free from bias or prejudice that may be brought against him because of his misdeeds in the past . . . See *Lane* v. *Warden,* 320 F.2d 179. State Bar of Texas, Commentaries on Revision of Code of Criminal Procedure (December 16, 1964).

These assumptions of the prejudicial effect of advising the jury of the defendant's record have been confirmed by researchers in the field of jury behavior. KLAVEN & ZEISEL, *The American Jury,* 127-130 (1966).

In *Estes* v. *Texas,* 381 U.S. 532 (1965), *Sheppard* v. *Maxwell,* 383 U.S. ——, 86 S.Ct. 1507 (1966), *Turner* v. *Louisiana,* 379 U.S. 466 (1965) and *Rideau* v. *Louisiana,* 373 U.S. 723 (1963) this Court has jealously guarded the right of the accused to be secure from the injection of prejudicial influences into the trial from non-judicial sources. Here we have a judicial procedure which through its operation permits the prosecution to inject irrelevant and admittedly prejudicial material directly into the trial. To hold such a procedure valid would be a serious retreat from the prior holdings of this Court.

IV.

The Procedure Here in Issue Permits the Evidence of Prior Convictions to Be Admitted for Reasons Which Are Irrelevant to the Question of Present Guilt.

At pages 6 and 7 of its brief, the state points out that if a defendant puts his character in issue through the use of a character witness or by taking the stand to testify, interrogation as to previous convictions is permitted. Presumably, we are to draw the conclusion that the procedure here in issue is but another well recognized exception to an exclusionary rule against admitting evidence of prior convictions. The procedure here in issue is distinguishable from exceptions to the exclusionary rule in that the exceptions all bear to some extent upon relevant inquiry into the guilt of the accused on the present offense. Thus, if the defendant testifies in his own behalf, he is attempting to prove his innocence of the present crime charged. Such testimony if not neutralized by the state, presumably leads the jury to a finding of innocence. Therefore, the state is given the opportunity to discredit and rebut such evidence by showing prior convictions. Similarly, if the defendant offers character testimony, the state is permitted to cross-examine these witnesses with regard to prior convictions. *Michelson* v. *United States,* 335 U.S. 469 (1948).

In the procedure in issue in this case the state is permitted to place in evidence prior convictions as part of its case in chief for a purpose which is irrelevant to the defendant's present guilt, to prove that he has a prior record for purposes of securing an enhanced penalty. The procedure here in issue is not even a stone in the "grotesque structure" of exceptions described by Justice Jackson in

Michelson. It is not supported by the exceptions to the exclusionary rule. Its eradication will not effect the balancing of policies reached in permitting the other exceptions. See, Comment, Recidivist Procedures, 40 N.Y.U. L.Rev. 332, 336 (1965); 43 Tex. L.Rev. 392 (1965).

V.

A Holding of This Court That the Procedure Here in Issue Is Unconstitutional Should Be Given Present Application.

The state urges that a holding that the procedure involved in this case is unconstitutional should not be given a retroactive application but should be applied in a *purely* prospective manner. (State's Brief, pp. 10-13.) The issue of retroactive application is not in this case and is presented to the Court in the case of *Reed* v. *Beto*, No. 70. We will leave the question of retroactivity to counsel in that case.

Without citation of authority or enumeration of policy considerations which demand such a ruling, the state asks that upon holding the procedure here in issue unconstitutional this Court refuse to apply the rule announced to this case, here on direct appeal, and limit its application in a purely prospective manner. This is urged as a "new constitutional rule". The rule suggested is neither new nor justified in this case. As discussed in *Linkletter* v. *Walker*, 381 U.S. 618, 621-622 (1965) and *Johnson* v. *New Jersey*, 383 U.S. ——, 86 S.Ct. 1772, 1781 (1966) this Court in prior cases has applied new judicial standards in a wholly prospective manner. See, *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964); *James* v. *United States*, 366 U.S. 213 (1961). However, even

when prior decisions were being overruled this Court has not seen fit to apply its constitutional holdings on matters involving human rights in a purely prospective manner. *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Miranda* v. *Arizona*, 383 U.S. ——, 86 S.Ct. 1602 (1966).

Admitting that there is no prior holding of this Court on the question presented, the state claims that it came to rely on the procedure here in issue by this Court's refusal of certiorari in prior cases and prays that any rule announced in this case be applied purely prospectively. (State's Brief, p. 11.) This reliance upon refusal of certiorari was ill founded. *Elgin, J., & E. Ry. Co.* v. *Gibson*, 355 U.S. 897 (1957), *Brown* v. *Allen*, 344 U.S. 443, 489 (1953). The only reason for ever making a rule purely prospective is out of concern for vested rights or policy considerations. Clearly the State of Texas has no vested right in the confinement of the petitioner. Granting him a new trial will not involve any of the policy considerations discussed by the court in *Linkletter* or *Johnson*. It is unthinkable that the highest court of a nation which prizes human dignity, freedom and the value of the individual, will limit its decisions so as to deny a petitioner on direct appeal the fruits of the rule announced in this case. Such a holding would foreclose the utility of this Court to all but institutional litigants. While there may be some issues that can be trusted to protection by groups, organizations, and committees, we respectfully submit that the best hope of a free society is still the selfish desire of the individual to live in freedom with his rights intact. The individual's quest for justice should not be dulled by taking away the just fruit of successful litigation involving rights guaranteed by the highest law of the land.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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